BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURT BELOW.

The first opinion of the Circuit Court of Appeals, affirming the order of the District Court is reported in 80 Fed. (2d) 897.

The second opinion of the Circuit Court of Appeals, on rehearing, reversing the order of the District Court, appears in 80 Fed. (2d) 905.

The last opinion of the Circuit Court of Appeals, which we now seek to have reviewed, is reported in 117 Fed. (2d) 149, and is set out on pages 450 to and including 456 of the record filed herein.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

The judgment and decree of which review is sought by your petitioners was rendered January 31, 1941 (R. 450 to and incl. 456), and a petition for rehearing was denied March 5, 1941 (R. 465). Motion to stay mandate was denied March 12, 1941 (R. 474-475).

The following cases are believed to sustain the jurisdiction of this Court:

U. S. v. Gulf Refining Co., 268 U. S. 542, l. c. 545;
Forsythe v. Hammond, 166 U. S. 506, l. c. 513.

III.

STATEMENT OF THE CASE.

Under the heading "A" in the petition, ante, is a statement of the case, so far as it is material to the consideration of the questions presented, and in the interest of brevity it is not repeated here.

IV.

SPECIFICATION OF ERRORS.

I.

The Circuit Court of Appeals erred in holding and deciding that respondent "rendered legal services beneficial to" the petitioners in obtaining the federal court decree of May 5, 1927, adjudicating and quieting title to certain remainder interests in the estate of Ehrhardt D. Franz, and in ignoring and refusing to follow the prior decision of this Court, rendered in State of Missouri v. Fiske et al., 290 U. S. 18, to the effect that the rights of these petitioners in regard to their respective remainder interests were to be litigated and determined in the state courts of Missouri.

II.

The Circuit Court of Appeals erred in holding and deciding that respondent "rendered legal services beneficial to" the petitioners in obtaining the federal court decree of May 5, 1927, and in ignoring and refusing to give proper weight and significance to the fact that the decision of the Supreme Court of Missouri, in which the rights of these petitioners to their respective remainder interests were ultimately determined (In re Franz's Estate, 344 Mo. 510, 127 S. W. [2] 401), was reached on entirely independent reasoning as a matter of first impression and was not

based in any degree upon the theory that these petitioners were afforded any protection by the federal court decree of May 5, 1927.

III.

The Circuit Court of Appeals erred in holding and deciding that respondent was entitled to an award of counsel fees for having created a fund in the federal court for the benefit of these petitioners, among others, when the petitioners were forced to litigate in the state courts of Missouri in order to establish and secure their rights in the fund, and did so through counsel other than respondent, only by virtue of the judgment and decree of the state court.

IV.

The Circuit Court of Appeals erred in overlooking the total absence of jurisdictional authority on its part to make an award of counsel fees for beneficial results obtained solely and exclusively in a state court in a case in which the claimant of the fees neither appeared nor represented anyone, and where there is no contract of employment and the relationship of attorney and client does not exist between the attorney seeking the fee and the parties from whom he seeks it.

V.

The Circuit Court of Appeals erred in holding and deciding that the adverse conduct of the respondent in opposing the inclusion of these petitioners in the decree rendered in the Federal District Court on May 5, 1927, and his subsequent efforts to deprive petitioners of their remainder estates did not bar respondent's claim for compensation against these petitioners based on the theory that his efforts on behalf of his own client resulted in benefit to petitioners.

ARGUMENT.

I.

The decree on the merits was rendered by the District Court below on May 5, 1927, and was affirmed by the Circuit Court of Appeals in the case of Buder v. Franz, 27 Fed. (2d) 101. When the State of Missouri sought to relitigate the subject in the tribunals of that state, the present petitioners sought injunctive relief. Although such relief was denied by the District Court, on appeal it was granted by the Circuit Court of Appeals in Fiske v. State of Missouri, 62 Fed. (2d) 150. The case came to this court on certiorari. (State of Missouri v. Fiske, 289 U. S. 720.) Upon final hearing this Court rendered its opinion, reported as State of Missouri et al. v. Fiske et al., 290 U. S. 18, wherein it stated, at page 29:

> "The contention that the question of ownership of the shares has been finally determined by the Federal Court affords no ground for the conclusion that the Federal Court may entertain a suit against the State, without its consent, to prevent the State from seeking to litigate that question in the state court."

Subsequently, the Circuit Court of Appeals, in referring to that opinion of this Court, said in Fiske et al. v. State of Missouri et al., 69 Fed. (2d) 683, at page 685:

> "We take the last above quotation as meaning that the rights of these appellants as to this matter are to be determined in the state court litigation."

Those who were the appellants in that case before the Circuit Court of Appeals are the present petitioners, and we submit that the quoted construction or interpretation of this Court's opinion by the Circuit Court of Appeals was correct and accurate. Nonetheless, the same Circuit Court of Appeals has now rendered a decision contrary

to the decision of this Court in State of Missouri v. Fiske, 290 U. S. 18, holding (R. 455) that the original decree on the merits rendered in 1927, and above referred to, "did adjudicate that all stock dividends belong to the corpus of the Ehrhardt D. Franz estate and ordered an accounting and discovery of all assets" (R. 455), and that, therefore, the present respondent, as the attorney for the plaintiff in that case, is entitled to an award of compensation against the present petitioners.

After the rendition of the opinion by this Court in State of Missouri v. Fiske, 290 U. S. 18, the State of Missouri did proceed to litigate the question of the ownership of the stock in its own courts and that litigation culminated in a decision of the Supreme Court of Missouri reported as In re Franz's Estate, 344 Mo. 510, 127 S. W. (2d) 401. In seeking to justify the award of counsel fees to the present respondent the Circuit Court of Appeals said (R. 453-4):

> "The decision of the Supreme Court of Missouri in in re Franz's Estate, 344 Mo. 510, 127 S. W. (2d) 401, holds exactly as to those interests as had been determined by the Federal Court as to the other 3⅓ interests. True, the state court reached its result on independent reasoning, but the effect was exactly the same as if it had adopted the 1927 decree as the basis of its opinion, and this court had in mind an outcome or result not antagonistic to the Federal Court decree of May 5, 1927 (affirmed by this court in 1928, Buder v. Franz, 27 F. [2d] 101)."

The respondent appeared only in the federal court and did not represent anyone in the state court proceedings (R. 234-5).

In other words, we are confronted with the following highly inequitable and intolerable situation. Although this Court held in State of Missouri et al. v. Fiske et al.,

290 U. S. 18, that the question of the ownership of the remainder interests of the present petitioners was a question to be decided in the state courts of Missouri, and although the present petitioners were obliged to contest lengthy and arduous litigation in the state courts to obtain a recognition and protection of their rights, the Circuit Court of Appeals now approves an award of counsel fees to the respondent (with whom petitioners had no contract whatever) on the theory that the whole question was settled in the federal court and that the lengthy contest in the state courts, as directed by this Court, was an idle and meaningless formality. We respectfully submit that such disregard for and emasculation of a decision of this Court should not be sanctioned.

II.

The Circuit Court of Appeals in the case below said, regarding respondent's claim for compensation from these petitioners (R. 455):

> "His employment was by Ehrhardt W. Franz, and appellants here opposed his client's interests and took position directly opposite to him. Appellants' attorneys objected to including their interests in the decree of 1927, or to amending their pleadings, and appellee feared that a decree broader than the issues might be subject to later attack. But the decree did adjudicate that all stock dividends belong to the corpus of the Ehrhardt D. Franz estate, and ordered an accounting and discovery of all assets."

The Circuit Court of Appeals in stating that appellee feared that a decree broader than the issues might be subject to later attack, undoubtedly had reference to the testimony of the appellee below (respondent here), appearing in the transcript at pages 172-3, as follows:

> "I think I did a very great deal in this court pro-

ceeding to compel a contribution from the other interests in this estate to reimburse Mr. Franz for his outlays. **I originated the idea, as I understand it, that has now resulted in a ruling of this Court relegating six and two-thirds of these remainder interests to the Probate Court, where Mr. Franz has a one-ninth interest.**

When his Honor, Judge Faris, announced his ruling, **I prepared a draft of a decree protecting and adjudging and quieting the titles to the remainder interests, only of the plaintiff and of the two estates represented by the Trust Company, and of the infants represented by Mr. Nelson.**

The reason why the other interests were not included within the draft submitted by me, or, rather, the reasons, are several:

Primarily, I was afraid to take the chances of having that final decree we wanted being held to be void or voidable, or otherwise attacked, by putting in anybody and (fol. 243) giving that person relief, when that person had not only not asked for relief, but had expressly declined to take relief. That was the primary reason.

I certainly did not draw a decree, or a draft of a decree, including those persons, and **I objected before Judge Faris to Mr. Buder's contention to the effect that these other heirs, the six and two-thirds, should be included in that decree, for a number of reasons.**" (Emphasis ours.)

Respondent's reasons for opposing or acting adversely to the present petitioners were, of course, a matter of his own concern. The important consideration, and admitted fact, that he did oppose the petitioners is the phase of the matter which entitles petitioners to invoke the protective doctrine heretofore announced by this Court.

In Hobbs v. McLean, 117 U. S. 567, this Court said, at page 582:

> "When many persons have a common interest in a trust property or fund, and one of them, for the benefit of all and at his own cost and expense, brings a suit for its preservation or administration, the Court of Equity in which the suit is brought will order that the plaintiff be reimbursed his outlay from the property of the trust, or by proportional contribution from those who accept the benefits of his efforts. See Trustees v. Greenough, 105 U. S. 527, where the subject is discussed by Mr. Justice Bradley, and the cases cited; and Central Railroad Co. v. Pettus, 113 U. S. 116. **But where one brings adversary proceedings to take the possession of trust property from those entitled to it, in order that he may distribute it to those who claim adversely, and fails in his purpose, it has never been held, in any case brought to our notice, that such person had any right to demand reimbursement of his expenses out of the trust fund, or contribution from those whose property he sought to misappropriate.**" (Emphasis ours.)

The Circuit Court of Appeals for the Second Circuit followed the same doctrine in Nolte v. Hudson Navigation Co., 47 Fed. (2d) 166, from which we quote, at page 168:

> "The expenses for attorneys who ask for an allowance have not been of any benefit to them. On the other hand, they have been detrimental. The interests of the clients of the attorneys who are seeking an allowance are and have been adverse to those of the bondholders who, having received no benefit from their work, should not be required to pay for any part of it. Hobbs v. McLean, 117 U. S. 567, 6 S. Ct. 870, 29 L. Ed. 940; Lamar v. Hall & Wimberly, supra."

Not only did respondent successfully insist upon the exclusion of petitioners from the decree of the District Court protecting the other remaindermen, which, according to respondent's own admission, was the cause of the controversy between the State of Missouri and the present peti-

tioners (R. 396), but after accomplishing their exclusion from the decree he went still further and sought to capitalize on that controversy. The record shows unequivocally and beyond the purview of doubt that respondent collaborated with the State of Missouri and rendered it material aid and assistance in its efforts to deprive petitioners of their remainder interests (R. 293-96, 388-89). We maintain that no equitable doctrine or maxim can be found which will justify the rewarding of counsel for such adverse efforts and active opposition toward those from whom he seeks remuneration.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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(22)

MAY 19 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1940

No. 1002

Johanna F. Fiske *et al.*
Petitioners

v.

S. Mayner Wallace

Respondent's Memorandum in Opposition to Petition for Writ of Certiorari

This memorandum undertakes a brief statement of the case and concludes with two observations that might possibly prove of some convenience to the Court.

Short Outline of the Case

Respondent was adjudged compensation, by the District Court, for legal services rendered by him in the lengthy Federal court litigation, of Ehrhardt W. Franz v. Gustavus A. Buder, et al., initiated in 1924 in the Eastern Judicial District of Missouri.

Petitioners now seek a review of the opinion (R. 451-6) of the Court of Appeals affirming the judgment.

Both courts below have found, as facts, that respondent preserved, for each petitioner, an estate of some $624,000.00 and, independently thereof, also that his services saved, to each one of them, approximately $293,000.00 in State inheritance and Federal estate taxation (R. 452, 455-6).

For that service, respondent has been allowed $10,000

against the estate of each of the petitioners—the so-called "6⅔ interests".

Ownership (as between a life tenant and the petitioners, as remaindermen) of a great amount of stock-dividends, in the Burroughs Adding Machine Company, was the central proposition (Buder, et al. v. Franz, et al., 27 F.—2d—101) in the case; and, practically, that involved substantially everything of any pecuniary value.

By the Federal decree of May 5, 1927, obtained by respondent, those dividends were allocated to the ownership of these petitioners who were also adjudged, by that decree, then to continue to own their respective remainder estates.

Final assessment of respondent's compensation was required (as an indirect consequence of Missouri v. Fiske, et al., 290 U. S. 18) to pend and to await an effort of the State of Missouri to re-litigate, in its own courts, even although to identically the same result, the said question of the ownership of the petitioners' said remainder estates —the question whether those estates had been acquired by Sophie Franz, the deceased life tenant, and were, therefore, subject to inheritance taxation.

That question was then decided, against the State, by its Supreme Court. (In re Franz' Estate, 344 Mo. 510, 127 S. W.—2d—401).

The same question had, as stated, previously been decided, in exactly the same way, in the Federal forum (Fiske v. State of Missouri, 62 F.—2d—150, 153-4 and 69 F.—2d—683, 685); and the Supreme Court of Missouri so agrees (In re Franz' Estate, 145 S. W.—2d—400, 401-402).

With respect to petitioners' alleged criticism of respondent, the Court of Appeals has ruled (R. 454-5) that they have no cause for any complaint. Respondent's testimony

(R. 37, 236 and 53, 67, 368-376, 388) upon that subject-matter stands unchallenged anywhere in the record.

Following the period of that criticism, the respondent, in said State court litigation, rendered, gratuitously, valuable legal service to the present attorneys for these petitioners to insure that the effectiveness of the Federal decree he had obtained be maintained against any contrary ruling by the State court; and that service was very readily accepted by the said attorneys (R. 381-3).

There Is No "Conflict" of Decision

It is respectfully submitted not only that there is no conflict, in any respect whatsoever, with Missouri v. Fiske, et al., 290 U. S. 18, but that the subject-matter of this Court's opinion, at that time, is so utterly foreign to the instant subject-matter that there could not possibly be any conflict.

Moreover, there is no warrant, anywhere, for petitioners' assertion that respondent's compensation was ever conditioned upon any recognition, by the State court, of the Federal decree of May 5, 1927.

Respondent's legal right to compensation (for his services in the main, or Franz-Buder, litigation, in the Federal forum) was finally adjudged in Wallace v. Fiske, et al., 80 F. (2d) 897, 905 (*cer. den.*—No. 919—298 U. S. 675).

Thereafter, the soundness of that ruling, in the Court of Appeals, was demonstrated by Sprague v. Ticonic National Bank, 307 U. S. 161.

All question now sought to be raised, by the petitioners, is of a purely factual nature upon which both courts below have agreed with concurrent findings.

Petitioners' Record Is Insufficient

It is also respectfully submitted that no review could be had upon this partial record.

The main, or Franz-Buder, litigation below (inherently a part—R. 408 & 409—of the instant cause) was before the Court of Appeals a number of times on other records. Material parts (in addition to the Federal decree below specified) of those records have not been brought here. All of said records were referred to in the Court of Appeals by the parties and judicially noticed by that Court on the hearing of the instant cause. The citations of those records are: 11 F. (2d) 854, 858; 15 F. (2d) 797, cer. den. 273 U. S. 756; 27 F. (2d) 101; 34 F. (2d) 353; 38 F. (2d) 605; 47 F. (2d) 507, cer. den. 283 U. S. 854; 51 F. (2d) 1047; 62 F. (2d) 150, 290 U. S. 18; 66 F. (2d) 457, cer. den. 290 U. S. 699; 68 F. (2d) 313; 69 F. (2d) 683, cer. den. 292 U. S. 636; 80 F. (2d) 897, 905, cer. den. 298 U. S. 675.

The said Federal decree of May 5, 1927, around which everything here now centers and which, as shown by the opinion (R. 455) below, is also of material significance, does not appear at all in the record before your Honors. (On page 3 of the Petition for Certiorari, a reference is made to a record filed here during the October, **1935**, Term for the provisions of that decree.)

No part of the contents of certain material Exhibits, lodged (R. 426-7) in the Court of Appeals, by the petitioners, as a part of their appeal below to that Court, is now reflected in the record here; and that fact is shown by the certificate (R. 475) of the clerk of the Court of Appeals.

Respectfully submitted

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St. Louis, Mo.
May, 1941

(23)

FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

JOHANNA F. FISKE et al.,
Petitioners,
v.
S. MAYNER WALLACE,
Respondent.
No. 1002.

PETITIONERS' REPLY TO RESPONDENT'S MEMORANDUM.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

JOHANNA F. FISKE et al., Petitioners,

v.

S. MAYNER WALLACE, Respondent.

No. 1002.

PETITIONERS' REPLY TO RESPONDENT'S MEMORANDUM.

Respondent's Outline of the Case.

Respondent, in an effort to mitigate the effect of his opposition to the petitioners and his efforts to destroy petitioners' remainder interests, seeks refuge behind alleged "valuable legal service to the present attorneys for these petitioners."

To begin with, such "services were offered to Messrs. Friday and Doerner" (R. 383) and admittedly not to the firm of Buder & Buder (R. 399), who represent different petitioners here. In any event, however, respondent makes no claim for services for any work done in the state court, where he represented no one (R. 234-5) and was a mere interloper seeking to protect his own interest (R. 383). Obviously, therefore, whatever respondent may have done in the state court is utterly immaterial.

Respondent's Denial of "Conflict."

Respondent maintains that his legal right to be compensated by the present petitioners was finally adjudged in Wallace v. Fiske, 80 Fed. (2) 905. If that be so, then one of "the crucial points in issue," as stated by the Circuit Court of Appeals (80 Fed. [2], l. c. 905), is whether respondent is entitled to an assessment of counsel fees against each of the petitioners' estates **"upon a final determination that these estates are protected by the decree of May 5, 1927."** As pointed out in our petition at page 5 and in the supporting brief at page 15, there never has been any such determination. Obviously, therefore, respondent's claim must fail, even judging it on his own theory.

Respondent's Contentions Regarding Sufficiency of the Record.

Rule 38, paragraph 1, of this Court requires that a petition for certiorari "be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed." Paragraph 7 of the same rule renders it necessary for the petitioners "only to print such additions as may be necessary to show the proceedings" in the Circuit Court of Appeals.

Petitioners have complied with those requirements (R. 475), and there is, therefore, no merit in the suggestion of the respondent that the records on the prior appeals and the decree of the United States District Court entered on May 5, 1927, should have been included. If respondent deemed the record insufficient, as he now contends, his remedy was to proceed in keeping with the provisions of Rule 75 (h) of the Federal Rules of Civil Procedure. He cannot voice his objection to the record for the first time after the case reaches this court. As stated in 3 Moore's Federal Practice, Sec. 75.01, page 3406:

> "Certification of the record by the district court is no longer necessary unless a difference arises as 'to whether the record truly discloses what occurred in the district court,' in which case the differences are to be resolved by the district court. **While the record may be corrected by the district or appellate courts, even after transmission, the record should be conclusive on the parties in the absence of a timely request for a correction thereof.**" (Emphasis ours.)

Of identically the same effect is Rule 25 (8) of the Rules of the United States Circuit Court of Appeals for the Eighth Circuit.

Respondent also maintains that the record is insufficient because certain exhibits which were lodged with the Clerk of the Circuit Court of Appeals (instead of being included in the printed transcript) are not included in the record filed in this court. Under an order of the Circuit Court of Appeals, made and entered on April 23, 1940 (R. 426-7), petitioners were permitted to lodge those exhibits with the clerk of that court in order to avoid encumbering the printed record with many hundred pages of matter which was only collaterally involved. At the present juncture of the case those exhibits are completely foreign to either of the reasons invoked by petitioners for the issuance of the writ of certiorari which they seek. Those exhibits are still in the custody of the Clerk of the Circuit Court of Appeals, and, in the event our petition is granted by this Court, can be made available here for the hearing on the merits. Respondent, or any other party to the case, could initiate the move for sending those exhibits to this court in keeping with rule 10, paragraph 4, of this court. The spirit of rule 18 of this court also indicates that such is the proper manner and method of protecting the rights of all parties to the proceeding.

Conclusion.

Under the circumstances, we respectfully submit that the respondent has completely failed to present any substantial answer to our petition, and that his contentions are advanced in an attempt to divert attention from the real merits of the petition and the cogency of the reasons therein assigned for the issuance of the writ.

Respectfully submitted,

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